No. 108.

Petition for Rehearing.

No. [illegible]

Rec'd & Dec'd Apr. 26, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A D. 1899.

THE FARMERS' LOAN & TRUST COMPANY,
Plaintiff in Error,

vs.

THE LAKE STREET ELEVATED RAILROAD COMPANY, THE AMERICAN TRUST & SAVINGS BANK and THE NORTHERN TRUST COMPANY,
Defendants in Error.

In Error to Supreme Court of Illinois.

PETITION FOR REHEARING.

CLARENCE KNIGHT,
SOLICITOR FOR THE LAKE STREET ELEVATED RAILROAD COMPANY, DEFENDANT IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

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In Error to Supreme Court of Illinois.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

We respectfully petition the court to grant a rehearing of the above entitled cause.

In the opinion of the court it is stated that the "Superior Court of Cook County erred in its decree perpetually enjoining and restraining the Farmers' Loan and Trust Company, the plaintiff in error, from proceeding with or prosecuting the said foreclosure suit in the Circuit Court of the United States" and also that it erred in enjoining and restraining the Farmers' Loan and Trust Company "from acting in any manner whatsoever under and by virtue of the terms, provisions and condition, of said mortgage."

As to the first part of the conclusion of the court, we desire to call attention to the fact that no error was assigned in the Supreme Court of Illinois to the effect that the state court erred in enjoining the Farmers' Loan and Trust Company from proceeding with or prosecuting the foreclosure suit because it had been brought in the United States court before this suit in the state court. To be sure, error was assigned as to that part of the decree, but it did not state that it was erroneous for the reason that a prior proceeding had been begun in the United States court, and that, therefore, the state court had no jurisdiction to enter that part of the decree.

It is not sufficient to state in general terms that the decree was erroneous, but if the party desires to bring the case here for review he must set up before the state Supreme Court "specially" the right claimed under the constitution or laws of the United States. Counsel for plaintiff in error recognized this fact by specially setting forth in the assignment of errors in this court that the decree was erroneous because it deprived them of rights under the constitution and laws of the United States.

We call the attention of the court to the assignments of error in this court, 16, 17, 18 and 19, under which they specially set up rights under the constitution and laws of the United States, and in this connection we call the attention of the court to the assignment of errors in the state and Supreme Court (printed record, pp. 596-597), by which it will be seen that it is not stated in these assignments of error that that part of the decree enjoining the plaintiff in error was erroneous because the plaintiff had begun a prior proceeding in the United States court and that that court had first acquired jurisdiction.

If counsel had intended to rely upon that point in the

state Supreme Court, it was their duty to "specially" set up and claim that point in the Supreme Court and give that court an opportunity to pass upon the question.

As said in

Oxley Stave Co. v. *Butler Co.*, 166 U. S., 653,

"Looking into the record, we do not find that any reference was made in the court of original jurisdiction to the constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

And at page 654 the court said:

"The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit and therefore no opportunity to be heard in vindication of their rights. Do such general allegations meet the statutory requirement that a final judgment of a state court may be re-examined here if it denies some title, right, privilege or immunity specially set up or claimed under the constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler County Circuit Court in the suit instituted by the County of Butler was not consistent with the due process of law required by the fourteenth amendment of the constitution of the United States. But can it be said that the plaintiffs specially set up or claimed the protection of that amendment against the operation of that decree by simply averring, without referring to the constitution or even adopting its phraseology, that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?"

The court then answered the question in the negative.

And the court, in referring to the requirement that the parties must specially set up or claim the right, said:

"This statutory requirement is not met if such declaration is so general in its character that the purpose of the parties to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficent that it may be inferred argumentatively from the facts stated."

And further the court said:

"Upon like grounds, the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the parties bringing a case here from such court intended to assert a Federal right."

In

McCormick v. *Seeberger*, 175 U. S., 274,

this court again said, opinion by Mr. Justice SHIRAS:

"Certainly there was no formal allegation in the assignments of error to the judgment of the Appellate Court that the plaintiffs in error were claiming any immunity under the laws or constitution of the United States, nor is there any allusion, however distant, in the opinion of the Supreme Court to any such question."

See, also, the case of

Telluride Power Co. v. *Rio Grande, etc., Ry.*, 175 U. S. 639.

This court said in

Scudder v. *Comptroller*, 175 U. S., 32:

"No mention of the constitution of the United States or any provision thereof by the plaintiff in error or by the court is to be found at any stage of the case while it was pending in the courts of the State of New York, and

it is impossible upon this record to avoid the conclusion that it never occurred to the plaintiff in error to raise a Federal question until after the case had been finally decided against him in the highest court of the state."

The court must have overlooked this question in determining this cause, although we called the attention of the court to the fact that the assignments of error 16, 17, 18 and 19, were not made in the Supreme Court of Illinois. (See p. 35, Brief of Defendant in Error, Lake St. Co.)

Neither do we find any answer of the plaintiff in error to this position taken by us in our former brief, and for these reasons we were sufficiently excused from not arguing the question more fully on the hearing of this cause.

We cannot see how the court can possibly hold that any Federal question was involved in this case, under the assignments of error, as to the two points upon which the court decided the cause. Neither in the Appellate Court of Illinois, nor in the Supreme Court of Illinois, did counsel set up or claim any right under the constitution or laws of the United States, because foreclosure proceeding had been begun in the United States court prior to this proceeding in the state court. Neither did the Supreme or Appellate Court pass upon that question. If the court will read the assignment of errors made in the state court it will find no reference in either to the constitution or laws of the United States as to these two questions.

It is too late to assert such Federal question after this court takes jurisdiction over the cause.

We make the further point that the first part of the conclusion of the court, that the court erred in enjoining the prosecution of the foreclosure case, that such error

should not be considered for the reason that it is a harmless error. A harmless error in this, that the Federal court had no jurisdiction in the foreclosure case and therefore no harm could result to the plaintiff in error by enjoining the further prosecution of such proceeding.

The court will remember that the trust deed or mortgage created the American Trust and Savings Bank as trustee and the Farmers' Loan and Trust Company as co-trustee. The Farmers' Loan and Trust Company as co-trustee would, therefore, have no right to file a bill to foreclose without joining the American Trust and Savings Bank as co-complainant, or if made defendant then, under the decisions of this court, the American Trust and Savings Bank would necessarily have to be ranged along with the Farmers' Loan and Trust Company, and which would destroy the jurisdiction of the Federal court in such foreclosure proceeding.

If any authority is needed upon this proposition, we refer the court to

Railroad Co. v. *Ketcham*, 101 U. S., 297;
Wall v. *Thomas*, 41 Fed. Rep., 620,

and to the case of

McGeorge v. *Big Stone Gap Imp. Co.*, 88 Fed. Rep., 599

where the court, in quoting from Perry on Trusts, said:

"If any one trustee who has accepted refuses to join in the proposed act or is incapable, the others cannot proceed without him, but an application must be made to the court. So if trustees bring suits or defend suits in court they must act jointly."

Neither do we think the court is sustained by the authorities in holding that the Federal court obtained jurisdiction by the filing of the bill, issuing of process and subsequent

service of the same as against the state court proceeding. This question was not pressed vigorously on oral argument before this court by the plaintiff in error, but it was presumed to have been substantially abandoned. It was certainly not argued to any extent on the part of the defendant in error, for the reason that it was not vigorously pressed in this court nor in the state Supreme Court. It was assumed by counsel that, unless there was actual seizure of the property, then as between two courts of co-ordinate jurisdiction the court whose process was first served had a right to proceed.

This was established by Judge Drummond in the case of

Union Mut. Life Ins. Co. v. *University of Chicago*, 6 Fed. Rep., 443,

which is a case almost the counterpart of the case at bar.

In the University case a mortgage was executed upon certain property to the Union Mutual Life Insurance Company. On the 18th of February a bill was filed in the Circuit Court of Cook County for the purpose of declaring the mortgage or deed of trust inoperative and prayed for an injunction to restrain the foreclosure of the mortgage and that it might be set aside and declared void. On the same day the life insurace company filed a bill to foreclose the mortgage. The bill in the state court was filed before the bill in the United States court, although on the same day, but no process of either court was served on the day the bill was filed. On the 19th of February, the day following, the process of the United States court was served before 11 o'clock of that day; the process issuing from the state court was not served until after 2 o'clock of the same day, so that process issuing from the United States court was first served, and the question was which

court obtained jurisdiction for the purposes contemplated in the bill, viz., for the foreclosure of the mortgage.

And Judge DRUMMOND said:

"Although the bill was filed in the state court first, on the same day, the rule. I take it, is well settled that the right of a court to take jurisdiction of a party depends upon the service of process upon the party. If a party commences a suit and process is not served it does not take effect against the party defendant howsoever long process may remain in the hands of the officer. The process of this court being first served on the defendants, the University of Chicago, and upon Boone, gave this court jurisdiction and the right to go on and foreclose this mortgage. It is said, and there is some evidence in an affidavit tending to establish the fact, that there was a race on the part of plaintiff in the case in this court first to obtain service upon the defendants. It may be, but at the same time this court must look at the facts. It is often a question which has been most diligent, and the courts have to determine rights according to the diligence of a party. And if in this case the plaintiff has been more diligent than the plaintiff in the state court, how can this court deprive it of its equity, and the preference to which it may be entitled? I do not know of any way that this can be done."

The case decided by Judge Drummond has been quoted in numerous cases and has been universally followed without dissent throughout the United States, both in state and Federal courts.

In the case of *Freeman* v. *Alderson*, 119 U. S., 187, in determining when a court obtains jurisdiction in proceedings *in rem*, and what are proceedings *in rem*, this court said:

"The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case."

"There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because though brought against persons they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other distribution of the property of the defendant to satisfy the demands of the plaintiff are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, *that citation to him is required* and that judgment therein is only conclusive between the parties." (The italics are ours.)

The court in referring to the case of *Cooper* v. *Reynolds*, 10 Wallace (U. S.), 308, quotes the following from the opinion of Mr. Justice MILLER in that case:

"If the defendant appears the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff."

The court in its opinion in the case at bar, in discussing the question as to when jurisdiction attached, adopts the language of the opinion in *Merritt* v. *Am. Steel Bridge Co.*, 79 Fed. Rep., 231.

The court in using the language in the Merritt case substituted for the words "of specific personal or real property" the words "of the property to be affected."

The court then omitted or overlooked the following passage, immediately following the words "control of specific personal or real property," in the Merritt case, viz.:

"In cases of the latter kind the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to Federal and state courts, being the outgrowth of necessity, is a principle of right and of law, which leaves nothing to the discretion of a court and may not be varied to suit the convenience of litigants."

And in the Merritt case, the court in quoting from the case of *Stanley* v. *Roberts*, 59 Fed. Rep., 836, used this language:

"It is equally well settled that the pendency of an action in one court will not bar or abate another action between the same parties, involving the same issues, in a court of co-ordinate jurisdiction, in which that jurisdiction is exercised, not by the seizure of the property, but by personal service of original process upon the defendants."

The opinion in the Merritt case refers to numerous decisions of the state courts and text writers, and the doctrine is uniformly sustained, for which we contend in this case, that where there is no actual seizure of the property, that then the jurisdiction attaches to the court whose process is first served.

In a subsequent case Judge Thayer, who delivered the opinion of the court in the Merritt case, in the case of

Zimmerman v. *So Relle*, 80 Fed. Rep., 417,

again had the question for determination and reaffirmed the doctrine of the Merritt case, and in referring to the Merritt case:

"We held in that case that when a suit is brought to enforce a lien against specific property or to marshal assets or administer a trust, or liquidate an insolvent estate, and in all other cases of a similar kind where, in the progress of the case, a court may find it necessary or convenient to assume control of the property in controversy, the court which first acquires jurisdiction of such a case by the issuance and *service of process* is entitled to retain it to the end without interference on the part of any other court of co-ordinate jurisdiction We held further that a rigid adherence to this rule both by the Federal and state courts is necessary in order to prevent unseemly conflicts which might otherwise arise. The doctrine in question has been so recently and fully considered, both in the case last referred to and in *Gates* v. *Bucki*, 53 Fed. Rep., 961, that a further discussion of the subject seems to be unnecessary."

In

Gates v. *Bucki*, 53 Fed. Rep., 961,

property had been attached and a bill to foreclose had been filed in the United States court, and the court held that the state court first acquired jurisdiction by actual seizure of the property and it had a right to proceed and determine the cause notwithstanding the fact a bill to foreclose had been filed in the United States court and service of process had therein.

It is further determined in that case, which would be the proper proceeding in this cause, that after the state court had adjudicated the question within its jurisdiction, the party would have the right to plead that adjudication in bar to the foreclosure proceeding, and the question then might be raised as to which court had the prior jurisdiction.

So, in the case at bar, this court having determined the state court had a right to proceed and adjudicate the controversy between the parties, then that adjudication

the defendant in error would have the right to set up in bar of the foreclosure proceedings, and then—and not until then—would this court have the jurisdiction and power on writ of error to determine as to whether the decree of the state court was a bar, but we deny the power of this court on this writ of error to determine the question as to whether the state court erred in entering that part of its decree enjoining the further prosecution of the foreclosure suit. That is a question that will arise upon filing the decree in the United States court as a bar to the further prosecution of the foreclosure suit or on a motion to substitute the new trustee in place of the Farmers' Loan and Trust Company.

We call the attention of the court to the case of

Rodgers v. *Pitt*, 96 Fed. Rep., 668, cited in our former brief.

where this question as to the jurisdiction between courts of co-ordinate power was passed upon.

In that case it was held that the jurisdiction of the court over the controversy is founded on the presence of the property by an actual seizure thereof or proceedings equivalent to an actual seizure.

It was held in the Rodgers case that a foreclosure suit was not a suit *in rem* but that "it may be that the nature of the suit comes within the general classification of suits *quasi in rem.*" Citing, Brown Jur., Sec. 70; *Freeman* v. *Alderson*, 119 U. S., 185.

The court then said:

"But whatever it may be called the facts are the state court had no independent or exclusive possession of the property involved herein. It had not issued any process against the property. No attachment had reached it. No receiver had been appointed to take charge of, manage

and control it. No injunction had been issued to restrain defendants from the use of any of the waters flowing in the Humboldt river. Neither the court nor any of its officers were in possession thereof. There was no seizure of the *res*. It cannot, therefore, be said that the state court first obtained such jurisdiction over the property as to entitle it to the exclusion of this court to hear and determine the controversy herein."

The court, in the *Rodgers* case, in quoting with approval from *Ball* v *Tompkins*, 41 Fed. Rep., 486, said:

"The possession contemplated as sufficient to make it exclusive is that which the court by its process, or some equivalent mode, has, either for the direct purpose of the proceeding, or for some other purpose ancillary to the main object, drawn into its dominion and custody some thing. That thing may be corporeal or incorporeal, a substance or a mere right. But a controversy, a question, an inquiry, is not such a thing. These may be the subject-matter of jurisdiction in a pending cause, which often proceeds from the beginning to the judgment without the court having taken actual dominion of anything. But there is no exclusive jurisdiction over such a matter. The result may be a judgment which will establish a right, but the court has not had any possession. * * * The control which each court has over its own process has always been found adequate to prevent mischief from divers judgments in the several jurisdictions. But, in proceeding on its way, whenever either court finds that the other has already taken actual dominion over some objective thing related to the subject, it will let the thing alone, so long as that dominion is retained, and proceed if there be enough material besides to support the exercise of its jurisdiction, and the pursuit may reach fruit. If not, it will stop."

It will be seen by the foregoing cases that a proceeding to foreclose is not spoken of as strictly a proceeding *in rem* but as a proceeding *quasi in rem*. But in every such case of *quasi in rem* it is held that complete jurisdiction does not attach until there is either service of process or

the property becomes actually *in custodia legis*. That in order to obtain jurisdiction as against another court of co-ordinate jurisdiction there must be in the foreclosure case:

(*a*) Actual seizure or taking of the property or proceeding equivalent thereto, and in no case has it been held that the mere filing of a bill to foreclose and the issuing of process, is equivalent to an actual seizure of the property or taking possession of the same. Nor does the mere filing of the bill and the issuance of process give one court jurisdiction as against another court where process is served first.

(*b*) Actual service of process prior to the service of process from the court of co-ordinate jurisdiction.

The court in its opinion refers to an Illinois case in which it is held that a suit in equity is commenced by filing a bill of complaint. It is true that that is the rule in Illinois, so far as arresting the statute of limitations is concerned, but it does not follow that filing the bill gives the court jurisdiction of the person or over the *res*. The Supreme Court of Illinois has held that where, under the chancery act, which provides that writs shall be made returnable to the first term of court after the date thereof, more than a term comes between the teste and return day of a summons, the writ thus issued is void and confers no jurisdiction upon the court.

Hochlander v. *Hochlander*, 73 Ill., 618.

That court also held that where, after the change in the statute to its present form, which provides that a summons in a chancery case shall be made returnable to the next term of court after the date thereof or the next succeeding term thereafter, a third term inter-

vene between the teste and the return day of the writ, a summons thus issued is void and confers no jurisdiction on the court.

Cavanaugh v. *McConochie*, 134 Ill., 516.

It will be seen that such a doctrine could not be sustained if, upon the filing of the bill of complaint, complete jurisdiction attached.

This court has in its opinion conceded that in applying the doctrine of *lis pendens* to a case of a third person who is a *bona fide* purchaser, notice is held to begin from the date of the service of the subpœna and not from the filing of the bill. But the court has overlooked the underlying principle of the doctrine of *lis pendens*. The object of *lis pendens* is not notice, as implied by the court in its opinion. That is only a secondary object and yields to the underlying object, which is to keep the subject matter of the suit or *res* within the power of the court. The doctrine of *lis pendens*, as usually understood, is the control which a court has over the property involved in a suit, during the continuance of the proceedings and until its final judgment has been rendered therein.

2 Bouvier's Law Dict , 266.

The leading cases which support this contention are

Newman v. *Chapman*, 2 Rand. (Va.), 93.

Murray v. *Ballou*, 1 Johns. Ch., 566.

The latter case is commented on with approval in the case of the

County of Warren v. *Marcy*, 97 U. S., 97

This question was recently considered by the Appellate Court, First District of Illinois, in the case of

Reid v. *Sheffy*, 75 Ill. App., 136.

The court in discussing this question said:

"It is not the paramount purpose of the rule *lis pendens* to give notice to intending purchasers, but the rule is founded upon the necessity that a court holds within its jurisdiction and control the subject-matter of litigation, so that it may finally dispose of it by its adjudication. The description of the property in the bill would therefore avail nothing, however accurate and however sufficient for purposes of notice, if there was no jurisdiction of the person of the vendor. And by this same reasoning, it would not be the filing of the bill, but the service of summons or entering of appearance which by bringing the person within the jurisdiction of the court would fix the time of the application of the rule. Although it is essential to the maintenance of the application of the rule that a bill be filed, describing the property, yet it is the writ and service, of the same, or appearance without service, which operates to cause the rule to begin to apply. And if, in the absence of statutory provision, the summons issue and be served before the filing of the bill, when the bill is thereafter filed, the *lis pendens* relates to the time of the service of the summons and applies to a sale made between the service of summons and the filing of the bill." Citing

Grant v. *Bennett*, 96 Ill., 513.

cited by the court in the case at bar as

Ewart v. *Bennett*, 96 Ill., 513.

If the primary and not the secondary object of the doctrine *lis pendens* is considered, then, it being established that the bill filed in the state court first became *lis pendens*, it is manifest that as against the state court, the Federal Court had not the right to proceed with the foreclosure bill filed in that court.

In

Halloran v. *Trum*, 125 Ill., 247,

a question arose on a creditor's bill as to when it became *lis pendens*, and as to which court was entitled to jurisdiction over the property, and it was held that

"The commencement of the suit by the filing of the bill does not constitute *lis pendens* until the summons or subpœna has been served."

In the Halloran case the court, in quoting from *Boynington* v. *Rawson*, said:

"It would be the means of great wrong and injustice if a party could by merely placing a bill among the mass of papers in the clerk's office acquire a lien in this secret way to defeat subsequent *bona fide* purchasers, * * * or even subsequent creditors litigating in good faith."

In

Milton v. *Sherry*, 2 Wallace, 237,

it was held that in case of a creditor's bill there was no lien upon the effects of a judgment debtor until service of process. In that case the court said:

"The filing of a creditor's bill and the service of proc ess creates a lien in equity upon the effects of a judgment debtor. It has been aptly termed an equitable levy."

It seems to us that the rule that the court adopted in this case, that the mere filing of a bill to foreclose confers complete jurisdiction would be the means of working great wrong and injustice if in this way a party could acquire a superior right to litigate a subject-matter.

The rule that we contend for, that it is the service of process or seizure of the property that first gives the court jurisdiction, has been established by the Supreme Court of Illinois in numerous cases in attachment suits.

The first case we cite is

Hinman v. *Rushmore*, 27 Ill., 508,

where the court said:

"It is a rule of law in order to give the court jurisdiction in an attachment case there must be service on the defendant or his property, and the action must be

commenced where the defendant has property or where he can be found."

In

Fuller v. *Langford*, 31 Ill., 248,

the court reaffirms the doctrine cited in *Hinman* v. *Rushmore.*

In

Haywood v. *McCrory*, 33 Ill., 459,

it was held in an attachment case that "Levy upon property or service must be made upon one or more of the defendants in such county or no jurisdiction will be acquired."

In

House v. *Hamilton*, 43 Ill., 186,

the court again approves of the doctrine in *Hinman* v. *Rushmore*, that there must be either personal service or an actual seizure of the property before the court obtains jurisdiction.

In

West v. *Schnebly*, 54 Ill., 523,

the court again held the rule that there must be in an attachment suit either service on the defendant or actual levy upon the property.

It will be seen, therefore, as to the law of Illinois that in proceedings in attachment, as in all other proceedings *in rem*, there must be either an actual seizure of the property, or personal service of process.

But we shall not attempt to enlarge upon this question as to whether jurisdiction attaches by the mere filing of a bill in a foreclosure case, but have called the attention of the court to sufficient cases, we think, to entitle us to have the court further consider this question, which is an important question and one which we think should be

further considered. It is far reaching, and if the doctrine is to be sustained that a different rule is to apply in a foreclosure case than other proceedings *in rem* or in *quasi in rem*, we think further consideration should be given to the subject.

If the doctrine of the court is to be sustained, then another question must be solved, and that is as to how long the plaintiff in a foreclosure case may hold the subpœnas in his pocket and not deliver the same to the marshal before another court may proceed and take jurisdiction of the subject-matter.

In this case it appears from the record that the party took out a subpœna and no attempt was made to serve the same. It is not claimed even that the party proceeded to the marshal's office to deliver the subpœna, but it is shown by the record that the subpœna was taken out and held by counsel for the plaintiff without any delivery to the marshal for service nor any pretense or any effort made in that direction. It is true an *ex parte* injunction was issued restraining the prosecution of any suit to foreclose, but if the *ex parte* injunction were issued improperly the party had full remedy by a motion to dissolve. A motion to dissolve was not made until an apparent conflict between the state court and Federal court arose, and then the injunction was dissolved by mutual arrangement between the Judge of the United States court and the Judge of the state court.

The decree which the court now holds to be erroneous enjoins the prosecution of a proceeding that must be admitted the parties would have no right to prosecute as the court has no jurisdiction, viz., over the foreclosure proceeding. And as to this point, as no harm can come to the plaintiff in error by enjoining this foreclosure pro-

ceeding, our motion to affirm should have been granted on the ground that the error, if committed by the court, was harmless error, and therefore the motion to affirm should have been sustained on this branch of the case.

As to that part of the conclusion of the court, which holds that it was error to enjoin the trustee from acting in any manner whatsoever under the trust deed or mortgage, certainly this court could have no jurisdiction to pass upon that question, at that involved no Federal question. The court had the power to hear and determine the question as to whether the trustee should be permitted longer to act under the trust deed. If the court in that part of its conclusion intended to assert that the decree was erroneous in enjoining the trustee from in any manner acting whatsoever under the mortgage, we think the court has drawn an erroneous conclusion and a conclusion which the court had no jurisdiction to determine. If the foreclosure suit should be dismissed, then we are entitled to that part of the decree enjoining the trustee from further acting, and the opinion of the court should be limited, if the court still intends to adhere to its conclusion, to that part of the decree only that enjoins the foreclosure case, so as to permit the defendent in error to interpose the decree in the United States court. There was submitted to the court a copy of the decree entered before the writ of error was taken out in this case appointing a new trustee in the place of the Farmers' Loan and Trust Company, viz., the Equitable Trust Company.

As the only Federal question that could possibly arise would be as to the right to enjoin the further prosecution of the foreclosure case, it could not be said that that part of the decree was erroneous which enjoined the

party from further acting under the trust deed, except so far as it might prohibit the party from prosecuting the foreclosure case. We think the court did not intend to so hold, but to avoid future questions we think in all fairness, the court should at least modify its opinion, and strike out that part which holds that the part of the decree that enjoins the trustee from in any manner acting was erroneous.

This suit is exactly the same kind of a suit that was brought by the plaintiff in error against one Hughes, reported in 11 Hun, 130. In that case Hughes had been appointed trustee under a railroad mortgage, and while absent in Europe under the provisions of the mortgage the Farmers' Loan and Trust Company was appointed in his place. After he returned from Europe he filed a foreclosure bill in the United States court to foreclose the mortgage. The Farmers' Loan and Trust Company filed a bill to enjoin Hughes from prosecuting the foreclosure suit and from acting as trustee under the mortgage. In their contention they were sustained and injunction was granted. The same doctrine was also sustained in the case of

Gibson v. *Trust Co.*, 58 Hun, 443.

See, also,

High on Injunctions, Sec. 24, 2d Ed.

In *Insurance Co.* v. *Howell*, 24 N. J. Eq., 238, injunction was there granted against the prosecution of a suit in the United States court at Chicago.

In *Gaylord* v. *R. R. Co.*, 6 Bissel, 286, the same doctrine was also sustained.

A case on all fours with the case at bar is that of

N. E. Mortgage Co. v. *Powell*, 97 Ala., 484.

In that case a bill was filed to set aside and cancel a mortgage given to a foreign corporation that had not complied with the laws of the state, and on the question of the right of temporary injunction the court said:

"In the present case complainant has cer ainly the right to try the question raised upon the validity of the mortgage. If there be a foreclosure pending that trial, he must needs surrender possession to the purchaser within ten days or else forfeit his right to redeem under the statute. If he should succeed in obtaining the relief prayed, he will have suffered such enforced temporary disposition with the injurious consequences which readily suggest themselves to the practical mind. We perceive no such special inconvenience or loss the defendant would suffer by the suspension of foreclosure until this cause can be heard on its merits, and if there be damage resulting to it from the injunction, it is such as can readily be measured and ascertained and fully compensated for by action on the bond."

In

Farwell v. *Gt. Western Tel. Co.*, 161 Ill., 616,

the court held distinctly that a court in chancery has a right to issue an injunction against the defendant proceeding in another case, and cites numerous cases to sustain the doctrine that

"On principle and authority it must be held that in a case demanding it jurisdiction exists in a court of equity to grant an injunction in one action to affect the proceedings in another action already pending in the same court, whether they be actions at law or in equity."

The right to enforce a decree by injunction does not raise a controversy over which this court has jurisdiction. The object sought inthis case was the appointment of a new trustee; that trustee was appointed and the court had the right in order to give effect to its decree to enjoin the Farmers' Loan and Trust Com-

pany from further acting under the trust deed. But the right to an injunction was not a controversy that was submitted to the court. The injunction was incident to the controversy, not the controversy itself. If a bill is filed to set aside a mortgage, and pending such action, the court issues an injunction to prevent a party from foreclosing, and that party happens to be a non-resident, the mere fact that he has been enjoined from bringing a suit in the Federal court does not raise a Federal question over which this court would have jurisdiction by writ of error to the Supreme Court. The fact that he was a non-resident, and had a right to bring a suit in the United States court, would not raise a Federal question which this court would have the power to pass upon, because it cannot be said that the mere right to bring a suit in the United States court involves a Federal question.

The court always has the power to enjoin parties from interfering with the subject-matter of the controversy before it, upon a proper showing. It cannot be said that because the court has this power to enjoin interference with the subject-matter of the controversy, that therefore the incidental question is changed into the main question so as to give this court jurisdiction as a Federal question.

This case must be determined as though no foreclosure bill had been filed. In such case this court would not have the power to review the right of the court, as incident to its jurisdiction over the subject-matter of the controversy, to enjoin the parties from further acting under the trust deed or mortgage.

If the court would not have the power to pass upon that question, if no foreclosure bill had been filed, then it has not the power to pass upon that question, even

though a foreclosure bill has been filed. It has not the power under this writ of error. The court has not the power to declare the incidental controversy the main controversy.

We do not desire upon this petition for rehearing to elaborate the points made or cite any additional authorities, but we respectfully ask the court to grant a rehearing of this cause, that the questions may be more fully considered.

We state our points as follows:

1st. *No error was assigned in the Supreme Court of Illinois specially calling the attention of that court to the fact that a bill of foreclosure had been filed in the United States court prior to the beginning of this suit, and therefore this court, under the constitution and laws of the United States, has acquired no jurisdiction within the rule established by its decisions.*

2nd. *The error found by this court was a harmless error, for the reason that the United States court had no jurisdiction in the foreclosure case and therefore no harm could result to the plaintiff in error in enjoining it from prosecuting a proceeding which it had no lawful right to prosecute.*

3rd. *This court erred in holding that the mere filing of a bill to foreclose without service of process or seizure of the property gave to the United States court prior jurisdiction.*

4th. *The error in that part of the decree in enjoining the trustee from further acting under the trust deed, this court did not have jurisdiction to consider.*

5th. *The injunction part of the decree was only incidental to the subject-matter in litigation, and therefore this*

court did not have the power to make the executing part of the decree the subject-matter of litigation or the controversy so as to give this court jurisdiction.

6th. *A case does not arise under the constitution and laws of the United States, because incidental to that case injunction may be granted.*

7th. *The injunction part of the decree in this case was not absolutely required as a part of the judgment or decree of the court. It was incidental to the decree, and therefore it did not raise any Federal question.*

We therefore respectfully submit that the court ought in justice to grant a rehearing of this cause.

Respectfully submitted.

CLARENCE A. KNIGHT,
Solicitor for The Lake Street Elevated Railroad Company, Defendant in Error.

I, Clarence A. Knight, solicitor for The Lake Street Elevated Railroad Company, one of the defendants in error in this suit, do hereby certify that in my opinion the foregoing petition for rehearing filed herein is well founded in point of law.

Clarence A Knight
Solicitor for said Defendant in Error.